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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS JOSEPH WILSON AND BOBBY ANTONIO BRYAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 17–24) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 25) was entered on November 28, 1973. On December 20, 1973, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to

and including January 28, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the holding of *Harris* v. *United States*, 382 U.S. 162 (involving the refusal of a witness to answer questions before a grand jury), precludes the use of summary contempt proceedings under Rule 42(a) of the Federal Rules of Criminal Procedure when a witness, in disobedience of a court order, refuses to testify at a trial after receiving a grant of immunity.

2. Whether, if the principles of *Harris* are found to govern the instant case, that decision should be overruled.

STATUTES AND RULE INVOLVED

18 U.S.C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. 6002 provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. 6003 provides:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

28 U.S.C. 1826 provides:

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken

by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

Rule 42 of the Federal Rules of Criminal Procedure provides:

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding

at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

1. Pursuant to an indictment returned in the United States District Court for the Southern District of New York, respondent Wilson and one Robert Anderson were charged with armed robbery of the federally insured Empire National Bank in Tuxedo, New York. Anderson was also charged with robbing the Nanuet National Bank in Mount Ivy, New York. A separate indictment also charged respondent Bryan with the Nanuet robbery. Respondents both pleaded guilty to charges in connection with the robberies.

Robert Anderson's case was called to trial in March 1973. At that time, Bryan had been sentenced provisionally to twenty-five years' imprisonment pursuant to 18 U.S.C. 4208(b). Wilson had not yet been sentenced.[1] Respondents were sworn as witnesses in the Anderson trial; however, both refused to answer any questions concerning their acquaintance with Anderson or their participation in the robberies, predicating their refusals on the privilege against self-incrimination. The reason advanced by each respondent for claiming the privilege was a fear that any testimony would adversely affect final disposition of his own

[1] Subsequently, Bryan's sentence was reduced to ten years. Wilson was committed for an indefinite term pursuant to the Youth Corrections Act, 18 U.S.C. 5010(b).

case by informing the sentencing judge of the details of the crimes.[2]

Pursuant to 18 U.S.C. 6002–6003, the trial court conferred immunity upon respondents, ordered them to answer the questions, and warned that failure to answer would constitute contempt of court. The witnesses persisted in their silence, were summarily held in contempt, and were sentenced to terms of six months' imprisonment, to be served consecutively to their sentences on the robbery charges. Execution of the sentences was stayed pending appeal.[3]

2. The court of appeals rejected respondents' claim of Fifth Amendment privilege, finding the grant of immunity to be dispositive and concluding that respondents had failed to follow the proper procedures to raise the issue whether the grant of immunity was coextensive with the privilege in the particular circumstances (App. A, *infra*, pp. 19–22). However, relying on its previous decision in *United States* v. *Marra*, 482 F. 2d 1196, which in turn purported to

[2] The district judge sought to resolve the problem as to Wilson by sentencing him immediately on the robbery charge, but found during allocution that the probation officer had not yet verified his information and that Wilson wished to present a psychologist's report. He therefore deferred sentence. Transcript of March 29 and April 2, 1973, p. 103. (We are lodging copies of the transcripts with the Clerk of this Court.)

[3] Transcript of March 30, 1973, pp. 3–23a; Transcript of March 29 and April 2, 1973, pp. 84–113; App. A, *infra*, pp. 18–19. At the summary contempt proceedings, respondents were represented by Wilson's attorney. She spoke in mitigation of sentence for the contempts but did not object to the summary procedure.

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rely on this Court's opinion in *Harris* v. *United States,* 382 U.S. 162, the court below concluded that respondents' refusal to give testimony at trial could not properly be the subject of summary contempt proceedings under Rule 42(a) of the Federal Rules of Criminal Procedure. Accordingly, the cause was remanded to the district court for proceedings pursuant to Rule 42(b), including a full hearing on the facts of the contempts (App. A, *infra,* pp. 22–24).

REASONS FOR GRANTING THE WRIT

In reversing respondents' summary contempt convictions, the Second Circuit in this case, as in *United States* v. *Marra,* 482 F. 2d 1196 (C.A. 2),[4] unjustifiably extended this Court's ruling in *Harris* v. *United States,* 382 U.S. 162 (involving contempt by a grand jury witness), to a situation to which, in our view, *Harris* has no application. Whatever may be the validity of the *Harris* rule barring availability of summary contempt with respect to a grand jury witness who refuses to testify, similar principles should not govern the case of a witness who, in disobedience of a court order, refuses to testify at trial and thereby inevitably disrupts the trial proceedings. Moreover, the opinion of the court below is in direct conflict in its interpretation of *Harris* with the decision of the First Circuit in *Baker* v. *Eisenstadt,* 456 F. 2d 382, certio-

[4] The government did not petition for certiorari in *Marra* because of mootness problems arising from the fact that Marra had already completed service of his sentence at the time the court of appeals decided that case. No such problem is present here, since respondents have not commenced service of their sentences for contempt.

rari denied, 409 U.S. 846.[5] This conflict should be resolved.

Should the Court be of the view that this case is factually and legally indistinguishable from *Harris,* it is the government's position that *Harris* was incorrectly decided and should be overruled. In either event, this case presents important issues involving the proper enforcement of the contempt power which should be resolved by this Court.

1. In *Harris,* this Court held that when a witness refuses after a grant of immunity to answer material questions before a grand jury and repeats the refusal before a judge, the contempt can be punished only after notice and hearing, pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure. In articulating the rationale for its ruling, the Court stated (382 U.S. at 164–165):

> Cases of the kind involved here are foreign to Rule 42(a). The real contempt, if such there was, was contempt before the grand jury—the refusal to answer to it when directed by the court. Swearing the witness and repeating the questions before the judge was an effort to have the refusal to testify "committed in the actual presence of the court" for the purposes of Rule 42(a). It served no other purpose, for the witness had been adamant and had made his posi-

[5] The decision of the Second Circuit is also in conflict with the holding of the Sixth Circuit in *United States* v. *Seavers,* 472 F. 2d 607, 611. There, although the summary nature of the proceedings was not directly challenged, the court affirmed the use of summary criminal contempt against a witness who refused to testify at the trial of his accomplice.

> tion known. The appearance before the District Court was not a new and different proceeding, unrelated to the other. It was ancillary to the grand jury hearing and designed as an aid to it. Even though we assume *arguendo* that Rule 42(a) may at times reach testimonial episodes, nothing in this case indicates that petitioner's refusal was such an open, serious threat to orderly procedure that instant and summary punishment, as distinguished from due and deliberate procedures, was necessary. [Citation omitted.]

Whatever the vitality of the prohibition against summary contempt proceedings for a witness's refusals to answer questions before a grand jury, such refusals at trial in the presence of the court are precisely the kind of conduct as to which "speedy punishment may be necessary in order to achieve 'summary vindication of the court's dignity and authority.'" *Harris* v. *United States, supra,* 382 U.S. at 164. In the present case, the witnesses' refusals to testify resulted in disruption of the proceedings through delay, and, indeed, the refusal of the respondent Bryan resulted in the collapse of the prosecution's case against Anderson for the Nanuet bank robbery.[6]

The instant case is but one of several recent decisions in which the Second Circuit has incorrectly expanded *Harris* to prohibit summary contempt proceed-

[6] In acquitting Anderson of the three Nanuet counts at the close of the government's case, the trial judge remarked to the prosecutor, "of course, your case has been substantially weakened through no fault of your own by the refusal of Mr. Bryan to testify * * *." Transcript of March 29 and April 2, 1973, pp. 158, 162.

ings where a witness has refused to testify at trial. See *United States* v. *Pace,* 371 F. 2d 810, 811, and *United States* v. *Marra,* 482 F. 2d 1196 (expressly relied upon below). These decisions are directly contrary to the decision of the First Circuit in *Baker* v. *Eisenstadt,* 456 F. 2d 382, certiorari denied, 409 U.S. 846, which expressly criticized *Pace* and reaffirmed the rule that "refusal to answer in the 'actual presence' of the court can be * * * dealt with [summarily]" (456 F. 2d at 388).[7] See also *United States* v. *Seavers,* 472 F. 2d 607 (C.A. 6), discussed at n. 5, *supra.*

Both *Seavers* and *Baker* recognize that the fundamental difference between the summary proceedings under Rule 42(a) and the notice and hearing provisions of Rule 42(b) is simply whether the contumacious conduct occurred in the presence of the court. Where, as here, the testimonial refusal occurred at trial, the court is aware of the circumstances surrounding the act and no purpose is served by notice and hearing.[8] In such circumstances due process does not require a hearing. *Groppi* v. *Leslie,* 404 U.S. 496;

[7] *Baker* v. *Eisenstadt* involved *habeas corpus* review of summary contempt proceedings of a state court. The court of appeals found Rule 42(a) reflective of the common law principles relating to criminal contempt, and it is clear that the court's holding is applicable with equal force to federal proceedings expressly governed by Rule 42(a).

[8] Moreover, in the present case respondents in fact were warned by the court that continued refusal to answer questions would result in contempt. Respondents were also afforded ample opportunity to explain the basis of their refusals to testify (*see* pp. 6–7, *supra*). In these circumstances, it is clear that no interests would have been served by further notice and hearing.

Johnson v. *Mississippi,* 403 U.S. 212, 214–215; *Bloom* v. *Illinois,* 391 U.S. 194, 205; *Cooke* v. *United States,* 267 U.S. 517, 534, 537.

Nothing in *Harris* requires a different result. There, the misconduct which formed the basis for contempt occurred before a grand jury, and the majority in *Harris* found that the act of bringing the witness before the court was ineffective to bring the conduct within Rule 42(a) as "committed in the actual presence of the court." Subsequent to the *Harris* decision, this Court has indicated that it is the commission of the contempt in the presence of the court which warrants summary proceedings. *Groppi* v. *Leslie, supra,* 404 U.S. at 504–505. Implicit in this principle is the conclusion that *Harris* must be confined to cases where the contempt occurred outside the court's presence.

The power of a court to compel testimony by a recalcitrant witness is a well-recognized necessity. See, *e.g., Shillitani* v. *United States,* 384 U.S. 364, 370; *United States* v. *Bryan,* 339 U.S. 323, 331. Indeed, the court below observed that "[o]ne of the major purposes of [the immunity statute] was to prevent what occurred in this case: the refusal of accomplices to testify about a crime, thereby aborting a conviction" (App. A, *infra,* p. 20). Although respondents were convicted of criminal (rather than civil) contempts of the court's authority, the coercive and deterrent aspect of the contempt sanction in the criminal form should not be overlooked. Many a witness who would draw back from engaging in contumacious disobedience of judicial authority if he knew that swift and certain punishment would ensue might,

conversely, be fortified in his obstinacy by deferral of the time of reckoning. In the context of a criminal trial, this enhanced possibility that critical testimony may be lost can jeopardize the integrity of the truth-finding process—a risk that is ordinarily diminished, if not eliminated, by the greater longevity of grand jury proceedings.

The important differences between grand jury proceedings and criminal trials, in relation to the question of the proper procedures for dealing with contempts, appear to have been overlooked or misunderstood by the court below. The life of a grand jury is anywhere from 30 days to 18 months; the normal criminal trial lasts only a few days. Thus, the "coercive" sanction of civil contempt, which may well prove effective with a recalcitrant grand jury witness and which the Second Circuit has suggested be utilized prior to resort to criminal contempt proceedings under Rule 42 in the context of a trial (*United States* v. *Marra, supra,* 482 F. 2d at 1201), is likely to be wholly ineffective in all but the most complex and lengthy trials.[9] Moreover, the delay of a few days that may be necessitated by compliance with Rule 42(b) procedures, while unlikely seriously to disrupt the activities of a grand jury (except when it is nearing the end of its term), may have substantial disruptive effects in the ordinary trial. It was as a result

[9] Indeed, in this very case the remedy of civil contempt would have been futile, since respondents were already incarcerated at the time of their refusals to testify. Transcript of March 30, 1973, p. 22; Transcript of March 29 and April 2, 1973, p. 87.

of its oversight of these important pragmatic distinctions that the court below was able to conclude that contumacious refusals to testify during the course of a trial are covered by the *Harris* decision.

2. Should this Court, notwithstanding the foregoing arguments relating to the distinctions between the grand jury and trial contexts, conclude that the holding of *Harris* is equally applicable to both contexts, we submit that the Court should then consider the question whether *Harris* should be overruled. We need not repeat here the argument on the merits of that issue, which have already been made on the government's behalf in connection with the litigation of the *Harris* case and of its predecessor, *Brown* v. *United States*, 359 U.S. 41, which *Harris* overruled. We note only that the continuing vitality of *Harris* may be considered to be in some doubt as a result of the approving citation of *Brown* in *Groppi* v. *Leslie, supra*, 404 U.S. at 504–505. As the Chief Justice there stated immediately prior to the citation:

> Where a court acts immediately to punish for contemptuous conduct committed under its eye, the contemnor is present, of course. There is then no question of identity, nor is hearing in a formal sense necessary because the judge has personally seen the offense and is acting on the basis of his own observations. Moreover, in such a situation, the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution. [Footnote omitted.]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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HENRY E. PETERSEN,
Assistant Attorney General.
WILLIAM L. PATTON,
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JANUARY 1974.

APPENDIX A

United States Court of Appeals for the Second Circuit

(Nos. 83, 101—September Term, 1973)

(Argued October 15, 1973

Decided November 28, 1973.)

Docket Nos. 73-1574, 73-1575

UNITED STATES OF AMERICA, APPELLEE

against

THOMAS JOSEPH WILSON AND BOBBY ANTONIO BRYAN, APPELLANTS

Before: LUMBARD, FRIENDLY AND FEINBERG, *Circuit Judges.*

Appeal from judgments of the United States District Court for the Southern District of New York, Morris E. Lasker, *J.*, finding appellants guilty of criminal contempt for refusing to testify, on self-incrimination grounds, despite grants of immunity.

Reversed and remanded.

SHEILA GINSBERG, New York, N.Y. (Robert Kasanof, The Legal Aid Society, on the brief), *for Appellant Wilson.*

HERBERT IRA HANDMAN, New York, N.Y., *for Appellant Bryan.*

KENNETH R. FEINBERG, Assistant United States Attorney (Paul J. Curran, United States Attorney

for the Southern District of New York; John D. Gordan III, Assistant United States Attorney, on the brief), *for Appellee.*

FEINBERG, *Circuit Judge:*

Thomas Joseph Wilson and Bobby Antonio Bryan appeal from judgments of the United States District Court for the Southern District of New York, Morris E. Lasker, *J.*, finding them guilty of criminal contempt for refusing to testify in the trial of Robert Joel Anderson for armed bank robbery. Both Wilson and Bryan were sentenced by Judge Lasker to six months imprisonment. They challenge their contempt convictions, arguing that they had the right to refuse to incriminate themselves and that, in any event, the procedure followed by the judge was defective. For reasons set forth below, we reject the fifth amendment claim but reverse for further proceedings before Judge Lasker under Rule 42(b) of the Federal Rules of Criminal Procedure.

I

The indictment on which Anderson was tried charged him with armed robbery of the Nanuet National Bank in Mt. Ivy, New York, and the Empire National Bank in Tuxedo, New York. The same indictment charged appellant Wilson, too, with robbery of the latter bank. This case was assigned to Judge Lasker. A separate indictment also charged appellant Bryan with the Nanuet bank robbery. This indictment was assigned to Judge Irving Ben Cooper. By the time Anderson's case came to trial before Judge Lasker in March 1973, both appellant Wilson and appellant Bryan had pleaded guilty to charges against them. However, neither had been definitively sentenced. Wilson's plea had been taken by Judge Las-

ker, who had deferred sentence.[1] Bryan had pleaded before Judge Cooper, who had imposed a provisional 25-year sentence (the statutory maximum), pending an evaluation under 18 U.S.C. § 4208(b).[2]

During Anderson's trial, the Government called appellants Bryan and Wilson as witnesses, the former on the Nanuet, and the latter on the Empire, bank robbery. Each refused to testify on self-incrimination grounds and persisted in this stance even though each received immunity under 18 U.S.C. §§ 6002–03, and the judge warned that a contempt finding would follow. When Wilson and Bryan continued to balk, Judge Lasker immediately found each one separately in contempt, and sentenced both to six months in prison consecutive to whatever sentences they received on the counts to which they had pleaded guilty. Counsel for Wilson was present throughout and, in the absence of counsel for Bryan, she attempted with the court's sanction to represent the latter as well.

II

As previously noted, at the time appellants were called as witnesses in the trial of Anderson, they had not yet been finally sentenced in their own guilty pleas. Their uncertainty as to the eventual sentences forms the basis for their broadest argument on appeal. They claim that any admission by them of the details of participation in armed robbery might weigh against them

[1] On June 1, 1973, the judge committed Wilson as a Young Adult Offender for an indeterminate term under 18 U.S.C. § 5010(b), as extended by 18 U.S.C. § 4209.

[2] On August 14, 1973, after Anderson's trial, and after receipt of a report under 18 U.S.C. § 4208(b), Judge Cooper reduced Bryan's sentence to ten years.

with the sentencing judge—in Wilson's case, the very judge who would hear the testimony, and in Bryan's, a judge of the same court could obtain the transcript. The Government responds that the privilege against self-incrimination ends immediately and completely with a guilty plea and that, in any event, the claim of privilege was not justified on these facts. Although the first argument raises substantial issues [3] and there is much to commend the second, [4] we need not deal with either. The grant of immunity under 18 U.S.C. §§ 6002–03 is dispositive here.

One of the major purposes of that statute was to prevent what occurred in this case: the refusal of accomplices to testify about a crime, thereby aborting a conviction. (Indeed, Bryan succeeded admirably—if

[3] None of the cases cited by the Government hold that a guilty plea immediately and completely ends the privileges even though sentence has not yet been imposed. The statement in *United States* v. *Sanchez*, 459 F. 2d 100, 103 (2d Cir.), cert. denied, 409 U.S. 864 (1972), relied on by the Government, was made without discussion; the dispositive factor was that the witness had not even been called. Although *United States* v. *Gernie*, 252 F. 2d 664, 670 (2d Cir.), cert. denied, 356 U.S. 968 (1958), contains a similar statement, the witness in that case had already been sentenced. Cf. *United States ex rel. Sniffen* v. *Follette*, 439 F. 2d 1082, 1083–84 (2d Cir. 1971). But cf. *United States* v. *Sclafani*, slip op. 4479, 4488–91 (2d Cir. June 27, 1973), cert. denied, 42 U.S.L.W. 3284 (U.S. Nov. 13, 1973). See generally McCormick on Evidence § 121 (2d ed. 1972 for the proposition that—at least when there has been a conviction after a trial rather than after a guilty plea—the privilege continues not only until after sentencing but also until after the time for appeal as of right has expired.

[4] The record shows, and oral argument substantiated, that Wilson refused to testify out of "adolescent loyalty" in order "to save a friend"—a motive possibly shared by Bryan, who had already been provisionally sentenced. Moreover, Wilson had earlier told the details of his complicity in the crime to the presentence investigator from the Probation Office.

that was his motive—since the Nanuet bank robbery counts were, without his testimony, dismissed at the close of the Government's case.) Because of the asserted danger of adverse use of the compelled testimony in sentencing, however, appellants contend that the immunity given was not coextensive, as is required, with the scope of the fifth amendment privilege. *Kastigar* v. *United States,* 406 U.S. 441, 449 (1972). But neither Wilson nor Bryan followed what we deemed to be proper procedure in raising the issue of "forbidden use." [5] If appellant Wilson doubted the ability of Judge Lasker to put out of his mind Wilson's statements at Anderson's trial, he should nevertheless have testified as ordered, but requested a different judge for sentencing on the robbery charge.[6] Cf. *United States* v. *Goldberg,* 472 F. 2d 513, 516 (2d Cir. 1973). Similarly, if Bryan genuinely feared an increased sentence on his guilty plea as a result of testifying in the *Anderson* case, he, too, should have given evidence, then asked that proper precautions be taken (e.g., sealing the record) to insure that Judge Cooper would not be privy to the statements made under grant of immunity. Both were, however, required to obey the mandate of 18 U.S.C. § 6002 that "the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. . . ." Since appellants, on the contrary, selected a wholly improper means of testing their constitutional claim the contempt judgments would stand regardless of the true extent of the privilege (an issue we need not reach), were it not for the fact that the trial judge erred pro-

[5] We do not decide that the potential uses would have been "forbidden."

[6] Wilson's default in this respect is another factor that casts in doubt the legitimacy of his invocation of privilege. See note 4 supra and accompanying text.

cedurally in arriving at his findings. To this additional problem we now direct our attention.

III

Our recent opinion in *United States* v. *Marra,* 482 F. 2d 1196 (1973), held that use of the summary criminal contempt sanction of Fed. R. Crim. P. 42(a) was inappropriate in the case of an orderly refusal to testify on fifth amendment grounds despite a grant of immunity. The proper course would have been to proceed under subdivision (b) of the Rule, which calls for disposition on notice and hearing, permitting "a reasonable time for the preparation of the defense."[7] Since the district judge here immediately found both Wilson and Bryan in contempt upon their

[7] Fed. R. Crim. P. 42 provides:

"(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

"(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict of finding of guilt the court shall enter an order fixing the punishment."

separate orderly refusals to answer the prosecution's questions, appellants argue that *Marra* governs, and compels reversal of the judgements. We agree, and therefore remand for further proceedings pursuant to Rule 42(b).

At the outset, appellee contends that the failure of appellants to object to the summary procedure below bars them from raising the claim on appeal. We hold, however, that under the circumstances, the request by counsel for Wilson for more time to research the fifth amendment issue constituted sufficient objection. And we refuse to penalize appellant Bryan for his failure to make timely objection to the Rule 42(a) proceeding, since his own counsel was not present. Although counsel for Wilson did her best to protect Bryan, the court having sanctioned her efforts in this regard, only a defendant's own lawyer could be fully aware of the considerations which might be raised in his behalf to mitigate a charge of contempt or the sentence thereunder, and of the likely usefulness of a hearing for development of these considerations.

Appellee also contends, in an effort to distinguish *Marra,* that Bryan and Wilson received the substance, if not the form, of a Rule 42(b) proceeding since both were represented by counsel and given a full opportunity to be heard. Mere presence of counsel, however, even had it been each defendant's own counsel, would not be determinative. In *Harris* v. *United States,* 382 U.S. 162 (1965), upon which *Marra* relies, counsel was also present.

Nor is the bare "opportunity to be heard" dispositive here since the "hearing" was confined to the matter of sentence. If, however, counsel had been given "a reasonable time for the preparation of the defense," Fed. R. Crim. P. 42(b); she might have marshalled and presented facts in mitigation of the charge. Sig-

nificantly, the record reveals the possibility of a psychiatric defense, at least for Wilson. Some of Wilson's psychological problems, disclosed by a court-ordered study, were explored at an abortive sentencing hearing on his guilty plea, preceding the refusal to testify. With respect to that conviction, Judge Lasker concluded: "I do not believe that in this complicated case I have sufficient information before me to permit me justly to proceed to sentence with Mr. Wilson." Shortly thereafter, nonetheless, he proceeded to sentence him for contempt. With additional time to prepare a defense, counsel for Wilson might have enlarged on the issue of appellant's mental health, and perhaps shown a relationship between any psychological difficulties and the refusal to serve as a witness. Finally, because of the posture of the case, the record is silent on other facts which may well exist in defense or mitigation of the charge against both appellants, and which could be properly developed at a plenary hearing.

Accordingly, since *United States* v. *Marra, supra,* controls, we reverse the judgments of contempt and remand for further proceedings pursuant to Rule 42(b).

APPENDIX B

United States Court of Appeals for the Second Circuit

[caption omitted]

JUDGMENT

Judgments reversed and that the actions be and they hereby are remanded to said district court for further proceedings in accordance with the opinion of this Court.

NOVEMBER 28, 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1974